(1)

Supreme Court, U.S.
FILED

021090 JAN 21 2003

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

JESUS A. CASTILLO, JR.,

Petitioner,

vs.

THE STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari To The Court of Criminal Appeals of Texas

PETITION FOR WRIT OF CERTIORARI

PAUL JOHN CAMBRIA, JR., ESQ.
Counsel of Record
LIPSITZ, GREEN, FAHRINGER,
ROLL, SALISBURY
& CAMBRIA LLP
42 Delaware Avenue, Suite 300
Buffalo, New York 14202-3901
(716) 849-1333

Counsel for Petitioner

Of Counsel:
ROGER WALTER WILCOX, JR., ESQ.

11 Centre Park
Rochester, New York 14614
(585) 232-6920

(B-2218)
THE DAILY RECORD

107 Delaware Avenue — Suite 81
Buffalo, New York 14202
(716) 847-2984

26 pp

QUESTIONS PRESENTED

1. Does the sufficiency of the evidence review standard generally employed by the State of Texas in criminal cases offend the First and Fourteenth Amendments of the United States Constitution when applied on review of an obscenity conviction?

2. Did the State of Texas prove by legally sufficient evidence that Petitioner knew the content and character of the charged comic book?

3. Can Petitioner's conviction be sustained where the State of Texas failed to introduce the whole of the charged comic book work?

4. Is the charged comic book constitutionally obscene upon independent judicial review?

PARTIES TO THE PROCEEDING

Jesus A. Castillo, Jr.,

Petitioner,

The State of Texas,

Respondent.

PARENT AND SUBSIDIARY COMPANIES

Petitioner has no parent or subsidiary companies to be listed pursuant to Rule 29.6 of the Rules of this Court.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

PARENT AND SUBSIDIARY COMPANIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS AND ORDERS BELOW 1

JURISDICTION OF THIS COURT 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 4

POINT I

THE SUFFICIENCY OF THE EVIDENCE REVIEW STANDARD GENERALLY EMPLOYED BY THE STATE OF TEXAS IN CRIMINAL CASES VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION WHEN APPLIED ON REVIEW OF AN OBSCENITY CONVICTION 8

POINT II

THE STATE OF TEXAS DID NOT PROVE BY LEGALLY SUFFICIENT EVIDENCE THAT PETITIONER KNEW THE CONTENT AND CHARACTER OF THE CHARGED COMIC BOOK 12

POINT III

PETITIONER'S CONVICTION IS NOT SUPPORTED BY LEGALLY SUFFICIENT EVIDENCE BECAUSE THE STATE OF TEXAS DID NOT INTRODUCE THE WHOLE OF THE CHARGED COMIC BOOK 15

POINT IV

THE CHARGED COMIC BOOK IS NOT CONSTITUTIONALLY OBSCENE 17

CONCLUSION 19

TABLE OF AUTHORITIES

Page

Cases

Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141 (1978) 11

Carroll v. State, 701 S.W.2d 913 (Tex. Crim. App. 1986) 14

Fiore v. White, 531 U.S. 225, 228-29, 121 S.Ct. 712, 714 (2001) 12

Glass v. State, 761 S.W.2d 806 (Tex. App. - Houston 1988) 14

Hamling v. United States, 418 U.S. 87, 123, 94 S.Ct. 2887, 2910 (1974) 12

In re Winship, 397 U.S. 358, 90 S.Ct. 1068 (1970) 12

Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781 (1979) 12

Jacobellis v. Ohio, 378 U.S. 184, 84 S.Ct. 1676 (1964) 9, 17

Jenkins v. Georgia, 418 U.S. 153, 94 S.Ct. 2750 (1974) 10

Kois v. Wisconsin, 408 U.S. 229, 231-32, 92 S.Ct. 2245, 2246-47 (1972) 16, 18

Miller v. California, 413 U.S. 15, 93 S.Ct. 2607 (1973) ... 13, 15, 17

Noto v. United States, 367 U.S.290, 81 S.Ct. 1517 (1961) 11

R.A.V. v. City of St. Paul, 505 U.S. 377, 112 S.Ct. 2538 (1992) ... 9

Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819, 115 S.Ct. 2510 (1995) 9

Scales v. United States, 367 U.S. 203, 81 S.Ct. 1469 (1961) 11

Smith v. California, 361 U.S. 147, 80 S.Ct. 215 (1959) 12

Staten v. State, 686 S.W.2d 268 (Tex. App.-Houston 1985) 14

Texas v. Johnson, 491 U.S. 397, 414, 109 S.Ct. 2533, 2545 (1989) 8

Statutes

Title 28 United States Code, Section 1257 1

Texas Penal Code Ann. Section 43.23(c)(1) 13

Texas Penal Code Ann. Section 43.21(a)(1) 3, 15, 16

Texas Penal Code Ann Section 43.23 ..... 2, 15, 16

United States Constitution, First Amendment 1

United States Constitution, Fifth Amendment 1

United States Constitution, Amendment XIV, Section 1 2

OPINIONS AND ORDERS BELOW

Jesus A. Castillo, Jr. v. State of Texas, 79 S.W.3d 817 (Tex. App.-Dallas 2002, pet. ref'd)

JURISDICTION OF THIS COURT

The order of the Texas Court of Criminal Appeals refusing the petition for discretionary review was issued October 23, 2002. Jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. §1257 and Rule 13 of the Rules of this Court as a final judgment entered by a state court of last resort.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment XIV, Section 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; or deny to any person within its jurisdiction the equal protection of the laws.

Texas Penal Code Ann., Section 43.23

> (a) A person commits an offense if, knowing its content and character, he wholesale promotes or possesses with intent to wholesale promote any obscene material or obscene device.
>
> (b) An offense under Subsection (a) is a state jail felony.
>
> (c) A person commits an offense, if knowing its content and character, he:
>
> (1) promotes or possesses with intent to promote any obscene material or obscene device; or
>
> (2) produces, presents, or directs an obscene performance or participates in a portion thereof that is obscene or that contributes to its obscenity.
>
> (d) An offense under Subsection (c) is a Class A misdemeanor.
>
> (e) A person who promotes or wholesale promotes obscene material or an obscene device or possesses the same with intent to promote or wholesale promote it in the course of

his business is presumed to do so with knowledge of its content and character.

(f) A person who possesses six or more obscene devices or identical or similar obscene articles is presumed to possess them with intent to promote the same.

(g) It is an affirmative defense to prosecution under this section that the person who possesses or promotes material or a device proscribed by this section does so for a bona fide medical, psychiatric, judicial, legislative, or law enforcement purpose.

Texas Penal Code Ann., Section 43.21(a)(1)

(a) "Obscene" means material or a performance that:

(A) the average person, applying contemporary community standards, would find that taken as a whole appeals to the prurient interest in sex;

(B) depicts or describes:

(i) patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated, including sexual intercourse, sodomy, and sexual bestiality; or

(ii) patently offensive representations or descriptions of masturbation, excretory functions, sadism, masochism, lewd exhibition of the genitals, the male or female genitals in a state of sexual stimulation or arousal, covered male genitals in a discernibly turgid state or a device designed and marketed as useful primarily for stimulation of the human genital organs; and

(C) taken as a whole, lacks serious literary, artistic, political, and scientific value.

STATEMENT OF THE CASE

By information dated September 30, 1999, petitioner was charged with the misdemeanor offense of obscenity (Texas Penal Code Ann. Section 43.23[c]) for selling a comic book entitled "Demon Beast Invasion, the Fallen" on September 22, 1999 [C.R. at 6][1]. By motion filed April 26, 2000, petitioner moved in the Dallas County Criminal Court No. 8 for a determination that the comic book was not obscene [C.R. at 9-10]. Said motion was denied by the Honorable Vickers L. Cunningham, Sr., by order dated August 21, 2000 [C.R. at 11]. Petitioner thereafter pleaded not guilty to the charge of obscenity, and a jury trial commenced on August 21, 2000.

Located on East Mockingbird Lane in the City of Dallas, Keith's Comics primarily offered popular and non-sexual comic books, such as Batman, Superman, etc., and mainstream fantasy paraphernalia, such as figurines of action figures and comic book characters, to the general public [R.R. at 32-35]. On September 22, 1999, Dallas Police Detective Craig A. Reynerson visited Keith's Comics "to see if there was any obscenity being sold in the store" [R.R. at 31-33]. He proceeded to the back of the store into an area marked off by a sign which read "No One Under 18 Allowed Past This Point" [R.R. at 33-34, 48]. Certain comic books Detective Reynerson considered adult in nature were displayed on three shelves and he picked out a comic book entitled "Demon Beast Invasion, the Fallen." The cover contained what *appeared to be* a drawing of an unclad female, but did not display female genitals or breasts and did not depict any sexual conduct [R.R. at 34-35, 48;

---

[1] Unless otherwise noted, numerical references in brackets are to either the Clerk's Record ("C.R.") or the Reporter's Record ("R.R.") used in the State court proceedings.

State's Exhibit 1]. The cover also stated "Absolutely Not For Children," but did not contain any sexually-oriented references [R.R. at 36; State's Exhibit 1]. Detective Reynerson took "Demon Beast Invasion" to the cash register and handed it, front cover up, to petitioner, who charged him $3.19 and placed the comic book in a bag [R.R. at 37-38].

Petitioner explained that, as a manager at Keith's Comics for approximately three years, he sold comic books mostly to adults. While the store carried comic books with violent and mature themes, such items were offered for sale only in a small section in the back of the store clearly marked off limits to children [R.R. at 134-136]. Petitioner recalled Detective Reynerson entering Keith's Comics and proceeding directly to the back of the store. Detective Reynerson asked specifically for "Demon Beast" and petitioner replied that he believed the store had sold out of that title [R.R. at 137]. A few minutes later, the detective approached Petitioner with a comic book. Petitioner saw the title "Demon Beast" on the cover, but did not open the book up to look inside. He also did not see anything on the cover indicating that the comic book contained sexual content and did not know what the book contained until it was produced in court during the trial [R.R. at 137-139]. While Petitioner understood that some comic books in the adult section carried a warning stating "not for children" and contained sexually explicit material, that warning was not exclusive to titles containing sexually oriented content and also applied to comic books with violent, but not sexual, themes [R.R. at 140-141].

Petitioner also presented compelling testimony concerning the literary and artistic significance of "Demon Beast Invasion, the Fallen," and highlighted its integral relationship with the three other volumes of the series of which it was a part. For instance, comic book expert Scott McCloud explained that the four volumes of the series are a thematic whole containing popular Japanese horror and science fiction themes dealing with the concept of an alien infiltration of earth culture and the conflicts it poses for personal

relationships [R.R. at 76-78]. Additionally, Professor Susan Napier described how the series tracked the development of a love relationship between two characters defending the earth against the alien invasion [R.R. at 98-118]. She noted that "Demon Beast Invasion, the Fallen" reflects a Japanese cultural fascination with metamorphosis and strange, bizarre creatures extending back to the fifteenth century, as well as an apocalyptic theme prevalent in this genre in Japan [R.R. at 102-103]. Further, in Professor Napier's opinion, the comic book contained "extraordinary scenes that are really quite beautifully drawn," substantiating the serious artistic value of the work [R.R. at 114-116]. Finally, Professor Napier explained that the comic book had political value insofar as it addressed issues of powerlessness [R.R. at 114-116].

Licensed private investigator Michael Christopher testified concerning the availability of comparable materials in Dallas County. During the weeks prior to trial, Christopher visited a number of stores in Dallas County and bought adult magazines. A Penthouse magazine bought at a "Park-It Market" less than a mile from Keith's Comics showed actual penetration of a vagina by a penis. The issue also contained oral sex, ejaculation and depictions of two women having sex with a grasshopper. Christopher testified that Penthouse is available at numerous places in Dallas County [R.R. at 119-122; Defense Exhibit 2].

At "Priscilla's," a boutique offering sex toys, videotapes and sexy clothing, Christopher purchased three magazines: (1) "Derriere" (which depicted intercourse between men and women involving actual penetration, anal sex and women performing oral sex on each other); (2) "Nugget" (a bondage magazine showing various sex acts involving males and females); and (3) a magazine depicting women in various sexual poses, fondling themselves and using sex toys [R.R. at 123-126; Defense Exhibits 3, 4 and 5]. Finally, Christopher visited an adult bookstore approximately one mile from the courthouse. There, he purchased a magazine entitled "Bitches and Snatches," which focused on

bondage and lesbian activity [R.R. at 128; Defense Exhibit 6].

As a private investigator, Christopher had spent a year and a half to two years gathering sexually explicit materials for attorneys. Based on this experience, Christopher concluded that such materials are prevalent in the State of Texas and are acceptable in Texas [R.R. at 129].

The jury rendered a verdict of guilty [Reporter's Record (hereinafter "R.R.") at 168] and on August 28, 2000, petitioner was sentenced by the Court to 180 days confinement in the Dallas County jail, one year probation and a $4,000 fine [C.R. at 38-39]. Petitioner's motion for a new trial was denied by the County Court [C.R. at 40].

The Court of Appeals for the Fifth District of Texas, at Dallas, affirmed petitioner's conviction, with a dissent by the Honorable Tom James [A-3-16][2]. In an opinion by Justice Molly Francis joined by Justice Fitzgerald, the Court of Appeals rejected eight points of error raised by petitioner. Justice James, writing in dissent, would have reversed petitioner's conviction on the ground that he did not "find in the record sufficient evidence appellant had knowledge of the sexually explicit character and context of the offending comic book to overcome the presumption of appellant's innocent. . ." [A-18].

Petitioner filed a petition for discretionary review by the Texas Court of Criminal Appeals on August 1, 2002 [A-140-166]. By order dated October 23, 2002, the Court of Criminal Appeals denied the petition for discretionary review [A-1]. This petition for a writ of certiorari now follows.

---

[2] Bracketed numerical references preceded by the letter "A" refer to pages of the Appendix submitted with this Petition.

POINT I

THE SUFFICIENCY OF THE EVIDENCE REVIEW STANDARD GENERALLY EMPLOYED BY THE STATE OF TEXAS IN CRIMINAL CASES VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION WHEN APPLIED ON REVIEW OF AN OBSCENITY CONVICTION

Petitioner's First and Fourteenth Amendment rights were violated when, on appellate review of his conviction of obscenity, the state court expanded its legal sufficiency review to include facts not adduced on the State's case, thereby relieving the State of its failure to prove that the charged comic book is outside the ambit of First Amendment protection. While legal sufficiency review in criminal cases where First Amendment rights are not implicated may properly encompass evidence adduced on the defense case, when an accused is put to a defense of his right to speak, the Constitution requires that the prosecution itself shoulder the burden of presenting a *prima facie* case as to each element of the crime. Consequently, appellate review of the sufficiency of the evidence supporting an obscenity conviction must focus on whether the State met its obligation of proving that the challenged work is beyond constitutional protection, without reference to defense evidence that might cure a gap in the prosecution's case. To hold otherwise would chill an accused's defense of his expressive rights and permit interference with those rights even when the State does not, in the first instance, possess sufficient proof of obscenity to warrant submission of the case to a jury.

That the First Amendment imposes special burdens on government is not a new concept in the history of this Court's jurisprudence. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." Texas v. Johnson, 491 U.S. 397, 414,

109 S.Ct. 2533, 2545 (1989); see also, R.A.V. v. City of St. Paul, 505 U.S. 377, 382, 112 S.Ct. 2538, 2542 (1992) (citations omitted) ["The First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed"]; Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819, 115 S.Ct. 2510, 2516 (1995) ["It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys"].

Accordingly, where government is permitted to regulate expression on the basis of content, this Court has not abjured application of the strictest protections to ensure that regulation does not take form as suppression. Indeed, the Court has not been dissuaded from supporting the bulwark of First Amendment protection even when it adds to the Court's own judicial burdens, as it expressly recognized in Jacobellis v. Ohio, 378 U.S. 184, 84 S.Ct. 1676 (1964). Rejecting the suggestion that a jury's verdict on a charge of obscenity is all but conclusive, the Court explained that expression is entitled to a greater degree of scrutiny before being excluded from the protection of the First Amendment's umbrella:

> The suggestion is appealing, since it would lift from our shoulders a difficult, recurring and unpleasant task. But we cannot accept it. Such an abnegation of judicial supervision in this field would be inconsistent with our duty to uphold the constitutional guarantees. Since it is only "obscenity" that is excluded from the constitutional protection, the question whether a particular work is obscene necessarily implicates an issue of constitutional law. Such an issue, we think, must ultimately be decided by this Court. Our duty admits of no "substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case.

Id. at 187-88, 84 S.Ct. at 1678 (citations omitted). See also, Jenkins v. Georgia, 418 U.S. 153, 94 S.Ct. 2750 (1974) [rejecting the contention that a jury's resolution of the obscenity *vel non* of the film "Carnal Knowledge" precluded further review of that determination simply because some evidence supported the jury's findings].

The First and Fourteenth Amendments should place no less a burden on state prosecutors seeking to overcome the presumption that an expressive work is constitutionally protected. As petitioner argued below in both the Court of Appeals for the Fifth District of Texas and the Texas Court of Criminal Appeals, when an accused faces a penal sanction for disseminating presumptively protected *speech*, as opposed to engaging in unprotected, non-expressive *conduct*, the State should be held strictly to the burden of proving, on its own case, that the speech at issue is beyond the protection of the First Amendment [A 123-27, 153-57]. The Court of Appeals for the Fifth District, however, rejected this contention and found that petitioner knew of the content and character of the comic book he sold, despite the fact that the State had offered only the cover of the comic book as evidence thereof. Indeed, the court acknowledged the truth of petitioner's assertions that the comic book's cover did not depict actual sexual conduct or even graphic nudity, that the title was not vulgar or sexually explicit, and that the comic book was sold in an establishment that did not retail predominantly sexually explicit materials, but relied on petitioner's testimony in his own defense that he knew that the comic book was shelved in the adults-only section and that said section of the store contained sexually explicit material [A-8-9].

Petitioner submits that this was constitutional error, especially in light of Justice James' dissenting opinion urging reversal: "With my conclusion that the cover conveyed no notice of its sexually explicit content, I would conclude the evidence falls far short of overcoming the constitutional and statutory presumption of innocence and proving beyond a reasonable doubt the requisite criminal scienter" [A-22; citations omitted]. Despite Justice James' concern

that the evidence of petitioner's knowledge of content and character was so weak as to render his conviction manifestly unjust [A-18], the unduly lenient legal sufficiency review standard employed by the majority of the Court of Appeals essentially gave the State a bye on that element of the obscenity.

Having been put in jeopardy by the State on the basis of the content of the charged material, an accused should remain free to defend his exercise of First Amendment rights without fear of curing a deficiency in the State's case through the presentation of defense evidence. Any other standard of review will promote a chilling effect on the vigorous defense of presumably protected speech. Moreover, if the State's case is "so lacking that it should not have even been submitted to the jury," Burks v. United States, 437 U.S. 1, 16, 98 S.Ct. 2141 (1978), the First Amendment minimally requires that the State not be relieved of its burden to prove that the challenged work is outside the ambit of constitutional protection by permitting an obscenity conviction to be affirmed on the basis of a legal sufficiency review considering evidence offered by an accused in defense of his expressive rights after the erroneous denial of a motion for an instructed verdict.

Indeed, enhanced protection of First Amendment rights in the context of a criminal prosecution has been explicitly recognized by this Court in the context of *strictissimi juris* sufficiency of the evidence review. See, Noto v. United States, 367 U.S.290, 81 S.Ct. 1517 (1961) [where the Court advised that in a membership conspiracy case, an appellate court must determine not just that there was proof that the defendant belonged to an organization that used both legal and illegal means to accomplish its goals, but also that the proof established that the defendant shared the criminal intent of the conspirators]; see also, Scales v. United States, 367 U.S. 203, 81 S.Ct. 1469 (1961). The government should similarly be held to a strict, non-transferable burden of proof as to every element of the crime of obscenity.

Accordingly, petitioner respectfully requests that this Court grant his petition for a writ of certiorari to the Texas Court of Criminal Appeals for the purpose of requiring that the state courts utilize the proper standard when reviewing the legal sufficiency of the evidence supporting his conviction of obscenity.

POINT II

THE STATE OF TEXAS DID NOT PROVE BY LEGALLY SUFFICIENT EVIDENCE THAT PETITIONER KNEW THE CONTENT AND CHARACTER OF THE CHARGED COMIC BOOK HE SOLD

The Due Process Clause of the Fourteenth Amendment "forbids a State to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt." Fiore v. White, 531 U.S. 225, 228-29, 121 S.Ct. 712, 714 (2001); see also, In re Winship, 397 U.S. 358, 90 S.Ct. 1068 (1970). Consequently, the Constitution requires that state court criminal convictions be supported by evidence from which any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781 (1979).

In this regard, an important element of any obscenity case is the State's obligation to prove beyond a reasonable doubt that the accused knew the content and character of the material alleged to be obscene. Hamling v. United States, 418 U.S. 87, 123, 94 S.Ct. 2887, 2910 (1974) ["It is constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials"]; see also, Smith v. California, 361 U.S. 147, 80 S.Ct. 215 (1959) [rejecting a bookseller's *per se* liability for the sale of an obscene work].

In the instant case, trial counsel moved for an instructed verdict on the ground that the State had not presented legally

sufficient evidence that petitioner knew the content and character of "Demon Beast Invasion, the Fallen" when he sold the comic book to the Dallas police detective [R.R. at 60-61]. The motion was denied and petitioner's appellate challenges to the sufficiency of the evidence supporting this element were rejected [A-1, 8-9]. This was error of a constitutional magnitude.

As described above, petitioner worked in a comic book store that retailed predominantly non-adult, mainstream comics and action hero figurines [R.R. at 32-35]. The store had a small area in which no one under the age of eighteen was allowed and from this area Detective Reynerson obtained a copy of "Demon Beast Invasion, the Fallen." Though the cover of this comic book warns that it is not for children, it does not depict actual nudity. The artistic rendering of the female on the cover does not depict uncovered female breasts or genitalia, or sexual conduct [see R.R. at 32-35; State's Exhibit 1], and the title of the work certainly does not suggest any sexual theme. Detective Reynerson handed the comic book face up to petitioner when he purchased it [R.R. at 37-38]. This is the sum of the proof offered on the State's case to establish petitioner's knowledge of the content and character of the charged materials.

Nothing in the record establishes that petitioner had any reason to believe that "Demon Beast Invasion, the Fallen" contained hardcore content of the type intended to be regulated by Texas Penal Code Ann. Section 43.23(c)(1). See also, Miller v. California, 413 U.S. 15, 93 S.Ct. 2607 (1973). Petitioner sold Detective Reynerson a comic book with none of the hallmarks of a sexually explicit magazine apparent on its cover and in a retail context quite unlike the obviously adult bookstores where hardcore materials are most often sold. Moreover, even if one considers petitioner's own testimony that he knew the comic book was shelved in the small adults-only section of the store, it is apparent from the trial proof that violent comics were also kept in that section. In fact, "Demon Beast Invasion, the Fallen" as a title is not

sexually explicit in any way and suggests violent, but not sexual, content.

The dearth of proof that petitioner was aware of the content and character of the comic book at issue stands in stark contrast to the several Texas cases cited by petitioner below in which the defendant's scienter was essentially an unavoidable conclusion in light of circumstances strongly indicative of his awareness of the graphic sexual content of the majority of the inventory made available to the public. For example, in Staten v. State, 686 S.W.2d 268 (Tex. App.-Houston 1985), not only did the cover of the magazine in dispute contain "highly explicit photographs of sex acts between a man and a woman" portraying actual sexual relations, but the store was clearly an adult bookstore which did not retail any "regular" magazines such as Time or Newsweek, and which carried as its inventory only sexually explicit magazines similar to the one charged and sexual devices which were displayed for sale. Id. at 270. Similarly, in Carroll v. State, 701 S.W.2d 913 (Tex. Crim. App. 1986), defendant's conviction was affirmed upon evidence that he worked in an adult bookstore that purveyed apparently obscene devices and magazines whose covers depicted ultimate sexual acts. Id. at 915. The store exhibited numerous signs containing the words "Hard Core" and numerous sexually explicit movie stills labeled "Dirty Movies." Direct testimony was also offered that the defendant in that case himself unpacked the graphic magazines, placed them in a plastic cellophane wrapper and heat-sealed the magazines before placing them on the shelves. Id.; see also, Glass v. State, 761 S.W.2d 806 (Tex. App. - Houston 1988) [where knowledge of content and character was shown by the State's proof that, in addition to a magazine cover containing depictions of sexual intercourse, the defendant worked in an adult bookstore named "Hot X Adult Theatre"; the bookstore contained "rows and rows" of adult magazines along each wall and the magazine selected for prosecution had a sexually explicit title].

No such circumstances existed in the case at bar. Petitioner did not work in an adult bookstore and did not retail predominantly sexually explicit materials. No sexual devices were displayed; only comic books and action hero figurines. The cover of the subject work did not show any graphic sexual content, and the title suggests a non-sexual, horror/science fiction theme. On these facts, petitioner could not have known of the content and character of the comic book, as recognized by Justice James in his dissent [A-18-22]. Accordingly, petitioner's conviction should be reversed due to legally insufficient evidence that he knew the content and character of "Demon Beast Invasion, the Fallen."

POINT III

PETITIONER'S CONVICTION IS NOT SUPPORTED BY LEGALLY SUFFICIENT EVIDENCE BECAUSE THE STATE OF TEXAS DID NOT INTRODUCE THE WHOLE OF THE CHARGED COMIC BOOK

Texas Penal Code Ann. §§ 43.21(a)(1) and 43.23 require the trier of fact to consider "the whole of the material" in determining whether the prosecuted work appeals to the prurient interest and lacks serious literary, artistic, political or scientific value. See also, Miller v. California, 413 U.S. 15, 24, 93 S.Ct. 2607, 2614-15 (1973). Here, Petitioner contended on appeal that the State's failure to present the other three volumes of "Demon Beast Invasion, the Fallen" rendered the evidence supporting his conviction legally insufficient [A-54-56, 127-30]. The Court of Appeals rejected this argument, explaining that "[t]he other volumes were not necessary or relevant to the obscenity issue" [A-11-12]. Discretionary review of this challenge was also refused [A-1, 160-62].

The trial proof demonstrated that the charged comic book is only the second volume of a four-volume series [R.R. at 75-76]. Comic book expert Scott McCloud testified that Volumes 1 through

4 are thematically linked and that the sexual themes set forth in Volume 2 do not stand alone, but are intended to be juxtaposed against the normal, healthy relationships found at the beginning of Volume 1 for the purpose of showing ways in which certain characters have been changed by the alien invasion which is the subject of the series [R.R. at 83-90]. McCloud's testimony was corroborated by Professor Susan Napier, who described the continuing themes of the series in detail and agreed that "Demon Beast Invasion, the Fallen," Volume 2, should be evaluated in the context of the entire series [R.R. at 98-118].

Having considered only one volume of a four-volume work, the jury cannot be said to have evaluated "the whole of the material." Texas Penal Code Ann. §§ 43.21(a)(1) and 43.23. This Court has made clear that the appropriate focus is on the thematic content and relationships within the work . See, Kois v. Wisconsin, 408 U.S. 229, 231-32, 92 S.Ct. 2245, 2246-47 (1972) ["In this case, considering the poem's content and its placement amid a selection of poems in the interior of a newspaper, we believe it bears some of the earmarks of an attempt at serious art"]. Since such content and relationship in this case span a four-volume series, the prosecution should have been required to present all four volumes for the jury's consideration.

"Demon Beast Invasion, the Fallen" was integrally related to the storyline and thematic content of the entire four-volume series and the jury should have been permitted to evaluate the work as a whole before rendering judgment on the question of obscenity. Since they were not allowed to do so, petitioner's conviction is not supported by legally sufficient evidence. Accordingly, petitioner respectfully requests that this Court grant his petition for a writ of certiorari to the Texas Court of Criminal Appeals.

POINT IV

THE CHARGED COMIC BOOK IS NOT CONSTITUTIONALLY OBSCENE

This Court is vested with the power to make an independent determination of the obscenity *vel non* of "Demon Beast Invasion, the Fallen.' Jacobellis v. Ohio, 378 U.S. 184, 84 S.Ct. 1676 (1964). Exercise of that authority in the instant case will demonstrate that the subject comic book is not obscene.

Applying the Miller test, the Court of Appeals concluded, on independent review, that "Demon Beast Invasion, the Fallen" is constitutionally obscene. In particular, the Court found that, "[t]hese drawings and comments are patently offensive and neither advocate nor communicate any ideas or opinions concerning serious literary, artistic, political, or scientific values" [A-13; (citation omitted)]. This determination cannot be sustained.

At trial, Petitioner presented compelling testimony concerning the literary and artistic significance of "Demon Beast Invasion, the Fallen." For instance, comic book expert Scott McCloud explained that the four volumes of the series are a thematic whole containing popular Japanese horror and science fiction themes dealing with the concept of an alien infiltration of earth culture and the conflicts it poses for personal relationships [R.R. at 76-78]. Additionally, Professor Napier described how the series tracked the development of a love relationship between two characters defending the earth against the alien invasion [R.R. at 98-118]. She noted that "Demon Beast Invasion, the Fallen" reflects a Japanese cultural fascination with metamorphosis and strange, bizarre creatures extending back to the fifteenth century, as well as an apocalyptic theme prevalent in this genre in Japan [R.R. at 102-103]. Further, in Professor Napier's opinion, the comic book contained "extraordinary scenes that are really quite beautifully drawn," substantiating the serious artistic value of the work [R.R. at

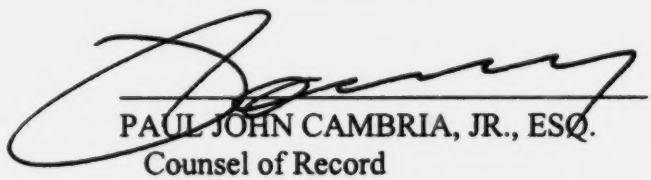
114-116]. Finally, Professor Napier explained that the comic book had political value insofar as it addressed issues of powerlessness [R.R. at 114-116].

In light of the foregoing, it is quite apparent that "Demon Beast Invasion, the Fallen" communicates ideas and opinions concerning issues of serious literary, artistic, political and scientific value. See, Kois v. Wisconsin, supra. The work's presentation of skillful, creative artwork and bona fide literary and historical themes are readily distinguishable from the base explicit photographic portrayals of actual sexual conduct often confronted by this Court, and readily available within Dallas County and the State of Texas [R.R. at 119-29; Defense Exhibits 2-6]. Consequently, Petitioner respectfully requests that this Court grant his petition for a writ of certiorari to consider the obscenity vel non of "Demon Beast Invasion, the Fallen."

CONCLUSION

Petitioner respectfully submits that this Court should grant his petition for a writ of certiorari for the purpose of reviewing and reversing his conviction of obscenity because the Texas appellate courts employed an erroneous standard of review, the State failed to prove that petitioner knew the content and character of the comic book at issue, the State failed to introduce the whole of the work into evidence as required, and, on independent review by this Court, "Demon Beast Invasion, the Fallen" is not constitutionally obscene.

Respectfully submitted,



PAUL JOHN CAMBRIA, JR., ESQ.
Counsel of Record
LIPSITZ, GREEN, FAHRINGER,
ROLL, SALISBURY & CAMBRIA LLP
42 Delaware Avenue, Suite 300
Buffalo, New York 14202-3901
(716) 849-1333

Of Counsel:
ROGER WALTER WILCOX, JR.